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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 1406

CHARLES ALLAN BEECH,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. _____

CHARLES ALLAN BROOM,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Charles Allan Broom prays that a writ of certiorari issue to review the judgment of The Court of Criminal Appeals of Texas entered in this cause on December 9, 1970.

CITATION TO OPINION BELOW

The opinion and judgment of The Court of Criminal Appeals of Texas is not yet reported and is printed in Appendix A hereto, infra, p. 1a.

JURISDICTION

The opinion and judgment of The Court of Criminal Appeals of Texas sought to be reviewed was delivered December 9, 1970. Timely Motion for Rehearing was thereafter overruled without written opinion January 27, 1971. February 1, 1971, the court stayed its mai late for a period of thirty days to permit filing of this Petition.

Jurisdiction to review the opinion and judgment of The Court of Criminal Appeals of Texas by writ of certiorari is invoked pursuant to 28 U.S.C. Sec. 1257(3).

How Federal Questions Were Raised
\t Examining Trial

At the close of testimony presented by the State at an examining trial before indictment (a transcript of that proceeding is in the record as State's Ex. 1) a motion to bind Broom over to the grand jury was opposed by his counsel because:

> "No cause at all. If anybody dressed like a hippie can be accosted that way and handled – if they can, then anybody can. That's not proper cause."

Professing to agree, the magistrate nevertheless refused to discharge Broom and ordered him bound over (State's Ex. 1, p. 52).

By Pretrial Motions

After indictment but before trial Broom filed and presented his Motion to Quash Indictment, paragraph 5 of which asserted:

> "The acts and conduct charged in the indictment do not constitute an offense against a valid law of the State of Texas for the reason that the prohibitions and penalties in the act with respect to private possession of Marijuana are based on a presumption of evil in mere possession and are, therefore, impermissible invasions of privacy guaranteed by the Constitution of the United States and the

> Constitution of Texas in the absence of a showing by the State of a compelling interest or reason to abridge such right."

The Motion to Quash Indictment was overruled in its entirety. Broom also filed and presented his Motion to Suppress evidence, asserting inter alia:

> "The search and seizure of the Defendant was without probable cause and without advance judicial approval through the warrant procedure, and the failure to comply with the warrant requirement is not excused under the facts and circumstances in this cause."

And also that the "intrusion upon the privacy of the Defendant's person (was) in violation of his rights under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, made applicable to the State of Texas under the Fourteenth Amendment to the Constitution of the United States. . . ." The trial court, finding only that "the facts and the law are with the State," denied the motion by Order on Motion to Suppress.

By Objection During Trial

During the course of trial before the court, without aid of a jury, when a defense witness who was with Broom on the occasion in question was asked whether one of the officers removed an object from Broom, the following objection and coiliquy occurred:

> "MR. CLINTON: Excuse me, Your Honor. Right at this point I hope it is understood that all of the testimony about what was taken is subject to our motion to suppress, which the Court has overruled, and we make an objection at this time to any testimony about it on grounds that it was the product of an illegal search and seizure for all the reasons stated in the motion. . .
>
> THE COURT: Let the record show that you may have all of the objections stated for the reasons stated, as the Court does not want you to be denied any of your rights on appeal."

By Points on Appeal

Upon conviction, Motion for New Trial being neither required nor appropriate, Broom gave notice of and perfected his appeal. In Brief for Appellant filed in The Court of Criminal Appeals of Texas, the federal questions sought to be reviewed here were again raised in grounds of error presented and argued in the Brief, to-wit:

"GROUND OF ERROR ONE

> The trial court erred in denying Motion to Suppress Evidence and in admitting fruits of search of person of Appellant in evidence.

GROUND OF ERROR THREE

> The trial court erred in overruling the attack against the indictment made in paragraph 5 of Motion to Quash Indictment to the effect that prohibitions and penalties in Article 725b, V.A.P.C. with respect to private possession of marijuana are impermissible invasions of privacy in the absence of a showing by the state of the compelling interest or reason to abridge such right."

After The Court of Criminal Appeals of Texas overruled the above and other grounds of error (see Opinion, Appendix A, infra), Broom filed, presented and argued his Motion for Rehearing, attacking the original opinion of the appellate court and reurging federal constitutional questions sought to be reviewed. Rehearing was denied without written opinion.

QUESTIONS PRESENTED

1. Whether the warrantless search of a person preceding his arrest by an officer who is requested by a fellow officer, acting on an anonymous tip, to look for three "hippie type individuals" in a public park reported to have been smoking marijuana is "unreasonable" under the Fourth Amendment to the United States Constitution?

2. Whether the "regular police radio broadcast" theory may be applied to provide probable cause required by the Fourth Amendment to the United States Constitution for a warrantless search of a person preceding his arrest by an officer who is requested by a fellow officer, acting on an anonymous tip, to look for three "hippie type individuals" in a public park reported to have been smoking marijuana?

3. Whether prohibitions and penalties in Article 725b, Vernon's Annotated Penal Code of Texas, with respect to private possession of marijuana are impermissible invasions of right of privacy in the absence of a showing by the State of a compelling interest or reason to abridge that right.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Article 14.04, Code of Criminal Procedure of Texas, 1 Vernon's Ann. C.C.P. of Texas, p. 381, Article 14.04, provides:

> "When Felony Has Been Committed
>
> Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused."

3. Article 725b, Penal Code of Texas, 2 Vernon's Ann. P. C. of Texas, p. 76 and Cumulative Annual Pocket Part, p. 15 provides in pertinent part:

"[Sec. 2(a)] It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug.

Sec. 23(a) Except as provided in subsections (b) and (c) of this section, any person who violates any provision of this Act is guilty of a felony and upon a first conviction is punishable by imprisonment in the penitentiary for not less than two years nor more than life; . . ."

STATEMENT OF THE CASE

Charles Allan Broom is a resident citizen of Austin, Travis County, Texas; he has never been convicted of a felony. On the occasion in question, in the company of two other persons walking in a public park, Broom was accosted, seized, searched and arrested – in that order – by officers of Austin Police Department and charged with possession of marijuana. Pease Park is situated just west of a principal north-south thoroughfare in Austin, a creek winds through the park, alongside of which is a hike and bike trail, and on this particular afternoon several persons were enjoying the park.

At approximately 3:00 p.m. at the Police and Courts Building in downtown Austin Police Captain Sweeney told Sergeant Jerry Spain that he, the captain, "had received a call that there were three hippie-type individuals in Pease Park on the hike and bike trail across from Nob Hill Apartments that were smoking marijuana." The caller was anonymous and was in no way identified to Sergeant Spain; neither the sex nor description of the "hippie types" was stated nor did the caller indicate how he or she purported to know that what, if anything, was being smoked was in fact marijuana.

Contacting Sergeants Phillips and Llewellyn by radio, Sergeant Spain arranged to meet them at a certain parking lot just off Lamar Boulevard on 12th Street where Spain related to his fellow officers what the captain had reported to him

and no more. Spain then proceeded alone in his unmarked vehicle north on Lamar to the 2700 block entrance to Pease Park. On the way, looking over into the park, Spain saw what he described as three "hippie type" persons in the park: a boy and a girl sitting on the grass and a boy on his feet with "his arms extended and . . . turning around and moving from side to side." Spain did not see any one of the three smoking anything.

Meanwhile Phillips and Llewellyn, riding together, had turned off at 24th Street, parked their vehicle in an area just south of 24th and the hike and bike trail and left their unit.[1] Phillips and Llewellyn walked north on the hike and bike trail and observed ahead of them and walking toward them Broom and his companions and a small dog. Broom was just walking along and "was not doing anything unusual." Phillips and Llewellyn accosted the three persons, stopped them, identified themselves and showed badges. As Phillips, who dealt directly with Broom, told it:

> "I showed them my badge and I think I told them my name and we had information they were down there smoking marijuana and I was going to search them. And he asked me if I had a warrant and I told him we didn't need one."

Phillips proceeded to search Broom while Llewellyn searched his male companion. From the left front pants pocket Broom was wearing, Phillips extracted a "real small matchbox" – "smaller than a regular penny matchbox" – that contained an inch and a quarter or maybe an inch and a half cigarette butt, later found to weigh 0.45 grams.

The confrontation between Phillips and Llewellyn and the

[1] While Spain did not testify he did so, both Llewellyn and Phillips recall a radio communication from Spain before leaving their unit. Llewellyn stated that Spain reported only that "there were three people in the park, right at 24th Street that looked like maybe the people we were looking for," and was certain that Spain did not describe the people or what they were doing. Phillips stated that Spain reported that he had seen three persons on the grass and they "appeared to be under the influence" of something not specified.

three persons occurred and the search of Broom by Phillips was completed before Spain, who was walking south from the 2700 block, reached the point of confrontation. However, apparently it was Spain who took Broom into custody after the search and after the matchbox was found and informed Broom that he was under arrest, although Phillips claims the credit for having done so as well. Either way, it is clear that arrest followed search and its fruits.

When substantially these facts were developed at examining trial, counsel for Broom objected to his client being bound over to the grand jury on the grounds that probable cause had not been shown and after indictment continued to raise the federal questions sought to be reviewed here by motion to suppress, objection to evidence at trial and grounds of error on appeal; see pertinent quotations and excerpts under heading "How Federal Questions Were Raised," supra, pp. 2-4.

REASONS FOR ALLOWANCE OF WRIT

Sibron v. New York, 392 U.S. 40, 64, 88 S. Ct. 1889, 1903 (1968) teaches:

> "The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so."

Thus the fundamental question raised here is whether when Officer Phillips accosted Broom, showed his badge, said he was going to search Broom and told him he didn't need a warrant to do so, he had "constitutionally adequate, reasonable grounds" for seizing and searching Broom. The Court of Criminal Appeals of Texas answered, in effect, that Phillips had such grounds as to satisfy requirements of the Fourth and Fourteenth Amendments. The manner in which the court formulated its answer gives rise to several reasons for allowance of the writ.

First, though the seizure and search issue was postured by the

parties as a matter to be resolved primarily by resort to the *Draper-Beck* dichotomy,[2] The Court of Criminal Appeals of Texas restated critical facts in such a way as to avoid that issue,[3] and perforce decided a federal constitutional question of substance in a way probably not – indeed, certainly not – in accord with applicable decisions of this Court such as *Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407 (1963)[4] and *Beck v. Ohio,* 379 U.S. 89, 85 S. Ct. 223 (1964).[5] In other words, given the undisputed fact that Spain began his venture upon an unverified report from an anonymous caller whose reliability and credibility are unknown, upholding the search of Broom conflicts with such applicable decisions of this Court.

Second, based upon its version of the facts of the case, The Court of Criminal Appeals of Texas decided a federal

[2]While *Draper v. United States,* 358 U.S. 307, 79 S. Ct. 329 (1959) was not specifically relied on by the State of Texas, *Leal v. State,* 332 S.W. 2d 729 (Cr. App., 1960) – a Draper-type case – was. *Beck v. State of Ohio,* 379 U.S. 89, 85 S. Ct. 223 (1964) was emphatically called to the attention of the court by Broom, along with *Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407 (1963) and other similar decisions.

[3]Although it is clear and uncontroverted, that the report to Spain by Captain Sweeney originated from an anonymous phone call to the latter (see pp. 6-7, supra), the opinion of the Court pretends that Sweeney informed Spain as a *fact* that three hippie-type persons were in the park smoking marijuana (see Appendix A, p. 2a, infra) and thereby avoids facing the problem of reliability and credibility of the unknown caller.

[4]83 S. Ct. 407 at 414: "To hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant" would subvert the fundamental policy of insuring that "the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police. . . ."

[5]85 S. Ct. 223 at 229: "But when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to show with considerably more specificity than was shown in this case what the informer actually said, and *why the officer thought the information was credible.*"

constitutional question of substance not heretofore determined by this Court. That is, the court determined the issue of "constitutionally adequate, reasonable grounds" for seizing and searching Broom by applying its "regular police radio broadcast" theory to supply those grounds, as shown by cases cited in support of its conclusion that "there was probable cause for the appellant's arrest without a warrant" and – although it is undisputed that search preceded arrest – that "search incident to his arrest was valid."[6] That the issue thus decided by The Court of Criminal Appeals of Texas has not heretofore been determined by this Court, as well as being an important one, is suggested by the grant of certiorari in *Whitely v. Warden*, April 27, 1970, 90 S. Ct. 1505,[7] argued January 13, 1971, as No. 136.[8] While Broom was not the subject of a statewide police radio broadcast, the court apparently thought

[6]The "lead" case is *Jones v. State*, 352 S.W. 2d 270 (Cr. App., 1961); it decided that a search was valid when it followed an arrest that was authorized by what was then Article 215, now 14.04, Code of Criminal Procedure of Texas, providing in effect that a peace officer may, without a warrant, pursue and arrest the accused when it is shown "by satisfactory proof" to him "upon representation of a *credible person*, that a felony has been committed, and the offender is about to escape, so that there is no time to procure a warrant . . .," the arresting officer having "learned the description of the automobile and its occupants from a regular police radio broadcast," 352 S.W. 2d at 271, headnote 4. The cases following *Jones* that are cited in the opinion in support of its conclusion are but variations on the same theme. See, e.g. *Weeks v. State*, 417 S.W. 2d 716 (Cr. App., 1967) cert. denied, 389 U.S. 996, 88 S. Ct. 500 (1967) in which the fact that information disseminated over a regular police radio broadcast originated with a "proven reliable informer" was said to distinguish the case from *Beck v. Ohio*, supra, and *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 (1964) in that in the latter the officer "who initiated the chain of events which resulted in the arrest of the accused had only a suspicion."

[7]The question there presented has been stated to be: "Did a statewide police radio broadcast based on a tip received by a sheriff from an unarmed and unidentified informer furnish probable cause for the warrantless arrest of a burglary suspect in the next country?" 7 Cr. L. 4023, Vol. 7 The Criminal Law Reporter No. 5, BNA, April 29, 1970.

[8]An unofficial report of argument in *Whitely*, 8 Cr. L. 4142, indicated similar underlying problems arise in this case.

that the verbal report from Captain Sweeney to Officer Spain, or perhaps from Spain to Llewellyn and Phillips, was sufficiently analogous to a police radio broadcast to supply the probable cause that is said to be found in such broadcasts. Thus just as the "regular police radio broadcast" theory has never been determined by this Court neither has the nicer precise issue of probable cause being supplied by a verbal report from one officer to another officer where the basis of the report is not shown to be reliable and credible.

Third, The Court of Criminal Appeals of Texas, being content to cite cases relying on the "regular police radio broadcast" theory without articulating a rationale for its conclusion of probable cause, has decided a federal constitutional question of substance in a way that its opinion may be taken to formulate a new doctrine of "reasonableness" for a warrantless search of a person; to wit: Probable cause for warrantless search of a person exists when the officer conducting the search confronts an unknown person who is not doing anything unusual at the time, but is with two companions who, in the officer's view, meet a general description given him by another officer, who in turn received a report from still another officer, that three persons generally described were smoking marijuana in the area where the person searched is found.[9] Certainly this is a proposition that has not heretofore been determined by this Court. However, other courts have addressed facets of the question. From, e.g., *Marsh v. United States*, 344 F. 2d 317, 325 (5 Cir., 1965); *Bynum v. United States*, 262 F. 2d 465, 467 (D. C. Cir., 1958); *Williams v. United States*, 308 F. 2d 326, 327 (D. C. Cir., 1962) and *Gatlin v. United States*, 326 F. 2d 666, 668 (D. C. Cir., 1962) and *Gatlin v. United States*, 326 F. 2d 666, 668 (D. C. Cir., 1963) it appears that a hard and fast rule has not yet crystallized.

[9]The proposition is stated in terms of findings by the court that Captain Sweeney informed Spain that "three hippie type persons . . . were smoking marijuana . . ." (Appendix A, infra, p. 1a) rather than in terms of the undisputed fact that Sweeney told Spain he "had received a call" from an anonymous caller to that effect, since the opinion purports to be based on the former rather than the latter.

Thus this case presents an opportunity for this Court to resolve a question that already has a history of some difficulty and, with increasing numbers of police officers and law enforcement agencies and cooperation between them, will continue to be troublesome until finally settled by this Court.

In addition to the manner in which The Court of Criminal Appeals of Texas formulated its determination that seizure and search of Broom satisfied constitutional requirements, importance of the questions presented provides further reasons for granting the writ.

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968) reiterated what had already become axiomatic in search cases:

> ". . . The police must, whenever practicable, obtain advance judicial approval of search through the warrant procedure . . . (and) . . . in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances. . . ."

The ruling of the court below stands as a statement of "exigent circumstances" excusing compliance with the warrant requirements of the Constitution. To the end that those requirements are not swallowed up by exceptions devised by lower courts, a decision by this Court on the exceptions said to exist is of utmost importance. Unless corrected by this Court the exception found by The Court of Criminal Appeals of Texas will be applied in future cases to countless numbers of citizens whose dress and appearance resemble what officers perceive as "hippie types."

We know that some peace officers view such types with special distaste and give keen attention to their presence in the community, as chronicled in *Hughes v. Rizzo*, 282 F. Supp. 881 (E.D. Pa., 1968), for example.[10] Surely a decision that holds that "hippie-type" is to some extent a sufficient description to warrant peace officers to go abroad in search of persons in a

[10] "It is quite clear from the record in this case that the primary motive for the various arrests and interrogations referred to above was a desire to rid Rittenhouse Square of 'hippies,' or at least those 'hippies' thought to be homosexuals, narcotics-users, or otherwise especially undesirable."

public park who appear to the officers to be "hippie-types" is such a significant harbinger as to evoke concern that a segment of society so labeled may become an easy target of seizure and search as an exception to constitutional warrant requirements.

Moreover readily anticipated ramifications of the "regular police radio broadcast" theory and, even more startling, of the "verbal report" notion embraced in this case, obviously not limited to "hippie-types," underscore importance of review of questions presented here. A search of anyone in a public area meeting a general description given by an anonymous caller of an alleged offender in that area is invited, if not sanctioned, by the opinion in this case. Such prospective invasions of privacy would seem to mandate consideration by this Court lest they fast become realities.

Regarding the question presented concerning prohibitions and penalties of Article 725b, Vernon's Annotated Penal Code, constituting impermissible invasions of privacy with respect to private possession of marijuana, suffice it to say that this federal constitutional question has not been heretofore determined by this Court. Indeed, it was expressly left open in *Stanley v. Georgia,* 394 U.S. 557, 568, 89 S. Ct. 1243, 1249, footnote 11 (1969). The Court of Criminal Appeals of Texas rejected the contention out of hand, pointing to seven prior decisions (Appendix A, infra, p. 3a) – only one of which dealt with the point: *Miller v. State,* 458 S.W. 2d 680 (Cr. App., 1970). In *Miller* the assertion was brushed aside with the simple explanation that the court "did not agree" that authorities cited "can be stretched to encompass" the contention, and reference was made to *Scott v. United States,* 395 F. 2d 619 (D. C. Cir., 1968). *Scott* did not actually rule on the contentions but expressly deferred to "assumptions of rationality which traditionally extend to congressional enactments" in the absence of "information assembled and tested within the framework of the judicial process."

Patently the question is of extreme importance, dealing as it does with one of the most significant phenomenon in contemporary society – especially in the subculture of our

youth. To argue the answer now is not appropriate, but it may not be amiss to suggest that the answer may be just as easily and correctly found in court decisions, statute books, legislative report, learned treatises, scholarly works and similar sources as in information assembled and tested within the judicial process. These sources along with confession of judicial ignorance then prevailing in *Baker v. State*, 58 S.W. 2d 534 (Cr. App., 1933)[11] are, we submit, sufficient to withhold "the deference in terms of assumptions of rationality" traditionally extended to legislative enactments. And given the opportunity by grant of certiorari in this case, a demonstration that private possession and use of marijuana are matters of personal liberty will be vigorously undertaken to the end that in making a significant encroachment on that liberty "the State may prevail only upon showing a subordinating interest which is compelling," *Bates v. Little Rock*, 361 U.S. 516, 524, 80 S. Ct. 412, 417 (196C).

[11] After stating that marijuana "contains a volatile drug" and "produces a high exhilaration, and when taken in excess, it motivates brutal criminality," The Court of Criminal Appeals of Texas confessed:

> "We have no authentic information touching the drug last mentioned above. No reference to it either in the dictionary or the encyclopedia has been discovered. The foregoing is from a statement in a magazine and the accuracy of the statement is not vouched for by members of the court."

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted and on further hearing on the merits the decision of The Court of Criminal Appeals of Texas in this case should be reversed, the judgment vacated and the case remanded or, alternatively, the prosecution ordered dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sam Houston Clinton, Jr., a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas has been served on counsel for Appellee by depositing same in the United States mail, postage prepaid, addressed to Robert O. Smith, District Attorney, Travis County Courthouse, Austin, Texas 78701, this day of February, 1971.

Sam Houston Clinton, Jr.

APPENDIX A

APPEAL FROM TRAVIS COUNTY

No. 43,293

CHARLES ALLEN BROOM, *Appellant*

vs.

THE STATE OF TEXAS, *Appellee*

OPINION

Upon a plea of not guilty following a waiver of trial by jury, the appellant was convicted for the possession of a narcotic drug, to wit: Marijuana. The punishment was assessed at six years which was probated.

The appellant contends that the trial court erred in admitting the results of the search of his person in evidence.

The evidence of the state reveals that on February 6, 1969, Sgt. Spain of the narcotic section of the Austin Police Department received a telephone call about 2:55 p.m. from Capt. Sweeney of said department informing him that three hippie-type persons were in Pease Park on the hike and bike trail and that they were smoking marijuana and were located near a sick raccoon. In response to this call, Spain notified Sgts. Llewellyn and Phillips to meet him near Pease Park which they did and he informed them of the information he had just received about the three hippies in Pease Park who were smoking marijuana "at this time." As Spain passed the park going north before he left his car and entered the park, he saw the three hippie-type persons; appellant was standing, and a boy and girl were sitting on the grass. While appellant was standing, he appeared to be dancing as he had his arms extended sideways and was turning around and moving from side-to-side. Sgt. Spain later left his car going north of the location of the three persons in the park and entered the hike and bike trail in Pease Park, and after going a short distance he observed a sick raccoon near where he had been informed that the three hippie-type persons were located. At this time the three hippie-type persons began walking south on the trail on which Llewellyn and Phillips were walking north. Spain approached the three hippies just seconds after Llewellyn and Phillips began talking to them. The appellant was identified at the trial as Charles Allen Broom.

Sgt. Phillips, an officer in the narcotics division, accompanied by Officer Llewellyn, testified that he saw appellant about 3:20 p.m., February 6, in Pease Park walking with a boy, a girl, and a dog. Upon meeting the appellant in the park they told him they were officers and that they had information "he had been or this group had been smoking

marijuana." In searching the appellant he found in his front pants pocket a match box which contained a partially burned cigarette which had marijuana in it. Phillips expressed the opinion that the appellant appeared to be under the influence of a narcotic. He also found some cigarette rolling papers in his left shirt pocket which appeared to be the same type used in the cigarette butt.

Sgt. Phillips had information from Sgt. Spain that there were two hippie-type boys and a girl; and upon observing appellant and his companions he "figured" that they were hippies. There were only three hippie-type persons seen in the park "at that time" by Spain. Before Phillips and Llewellyn located the suspects they received a radio dispatch from Sgt. Spain that he had seen these individuals on the grass in the park across from the Nob Hill Apartments and "they appeared to be under the influence and –"

Phillips and Llewellyn parked their car and began walking north in the park looking for the persons described by Sgt. Spain and they soon saw them abour forty yards away. As Spain arrived, Phillips was searching the appellant and on finding the match box containing marijuana he told appellant he was under arrest for the possession of marijuana.

Sgt. Llewellyn testified substantially as did Sgt. Phillips except that Llewellyn testified without objection that he knew the appellant had been arrested on an indictment charging him with the illegal possession and sale of LSD in 1967.

The record reveals that as Sgt. Spain travelled north on Lamar Boulevard alongside Pease Park to the place where he stopped and entered Pease Park before he started walking south on the hike and bike trail that his police car could have been seen by persons sitting in Pease Park about 3 p.m.

The information received by the officers and the facts and circumstances as shown by the evidence were sufficient for the trial court to conclude there was probable cause for the appellant's arrest without a warrant. The search incident to his arrest was valid. Jones v. State, 352 S.W. 2d 270; Lamar v. State, 415 S.W. 2d 926; Weeks v. State, 417 S.W. 2d 716, cert. den. 389 U.S. 996, 88 S. Ct. 500, 19 L.Ed. 2d 494; Houston v. State, 428 S.W. 2d 352.

In his second, third, and fourth grounds of error the appellant challenges the constitutionality of Art. 725b, V.A.C.C.P., on the grounds that the classification of marijuana as a narcotic drug is arbitrary, unreasonable, irrational and a denial of equal protection of law; that the prohibitions and penalties in Art. 725b, supra, with respect to private possession of marijuana are impermissible invasions of privacy in the

absence of a showing by the state of the compelling interest or reason to abridge such right; and that the six year probated sentence imposed constitutes cruel and unusual punishment for the alleged offense.

In passing on grounds similar to those presented by the appellant, this Court has held Art. 725b, supra, to be constitutional. *Arredondo v. State,* 168 Tex. Cr. R. 110, 324 S.W. 2d 217; *Martinez v. State,* Tex. Cr. App., 373 S.W. 2d 246, cert. denied, 377 U.S. 937, 84 S.Ct. 1345, 12 L.Ed. 2d 301; *Segura v. State,* Tex. Cr. App., 427 S.W. 2d 864; *Locke v. State,* 168 Tex. Cr. R. 507, 329 S.W. 2d 873; *Rey[illegible] v. State,* Tex. Cr. App., 434 S.W. 2d 362; *Johnson v. State,* 447 S.W. 2d 927; *Miller v. State,* No. 43,085, 458 S.W. 2d 680.

The appellant's grounds of error are overruled.

The judgment is affirmed.

Belcher, Judge

(Delivered December 9, 1970)